Supreme Court, U. S.
FILED
MAY 1 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1974

No. 74-1274

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC.,

Respondent,

v.

ABBOTT LABORATORIES, et al,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

ROGER TILBURY
1123 S. W. Yamhill Street
Portland, Oregon 97205

HENRY KANE
220 Park Plaza West
10700 S. W. Beaverton Highway
P. O. Box 518
Beaverton, Oregon 97005
Attorneys for Respondent

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 4-75

Supreme Court, U. S.
FILED
MAY 1 1975
MICHAEL RODAK, JR., CLERK

INDEX

	Page
Summary of Brief	1
Opinions Below	1
Jurisdiction	2
Question Presented	2
Respondent's Objection to Granting Petition	3
Statement of the Case	7
Hospital Agreements	9
The Record Below	10
Argument	11
The Competition Issue	12
Prior Decisions	12
Petitioners' Cases Irrelevant	14
Petitioners' Political Arguments Should Be Rejected	18
(a) Costs	18
(b) Bookkeeping	19
(c) Convenience to the public	20
(d) Operation of a Modern Hospital	20
(e) Outpatients	21
(f) End Use of the Proceeds	22
American Society of Hospital Pharmacists Supports Decision	24
Conclusion	25

INDEX (Cont.)

APPENDIX

Page

Small Business Problems in the Drug Industry (App. I) A1

Nonprofit Institutions Act Report (App. II) A11

IRC § 1.513-1 (a) Definition of unrelated trade or business (App. III) A16

Differences Between *Logan Lanes* and Case at Bar (App. IV) A19

April 13 and 18, 1975 Letters to Petitioners (App. V) A25

Amended Complaint (App. VI) A31

Rogue River Valley Irrigation District v. *Employment Division, Ross Morgan, Administrator* (App. VII) A39

Howard Steinbach Affidavit re Non-Profit Hospital Drug Dispensing Practices (App. VIII) A43

Plaintiff's R. Franklin Hart Affidavit re Hospital Drug Dispensing Practices (App. IX) A49

Stanley E. Hartman Affidavit re First Year that Portland Area "Non-Profit" Hospitals Applied for Pharmacy Licenses (App. X) A52

OAH Legal Labor and Legislative Letter (App. XI) A57

American Society of Hospital Pharmacists Resolution (App. XII) A60

INDEX OF AUTHORITIES

Cases Page

Anchor Serum Company v. *Federal Trade Commission*, 217 F.2d 867, 873 (7th Cir. 1954) 24

Browder v. *United States*, 312 U.S. 335, 339-340 (1941) 15, 16

Civil Aeronautics Board v. *Delta Air Lines, Inc.*, 367 U.S. 316, 323 (1961) 17

Eastern Kentucky Welfare Rights Organization v. *Simon*, 506 F.2d 1278 (D.C. Cir. 1974), Dkts. 74-1110 and 74-1124 ..... 14, 15, A24, A25

Federal Maritime Commission v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) 11

Federal Trade Commission v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) 11

Federal Trade Commission v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959) A6

Fortnightly Corporation v. *United Artists Television, Inc.*, 392 U.S. 390, 401-402 (1968) 15

Gulf Oil Corporation v. *Copp Paving Company*, — U.S. —, 95 Sup. Ct. 392, 399, 402 (1974) 16-17

Louis W. and Maud Hill Family Foundation v. *United States*, 347 F. Supp. 1225, 1227 (Minn. 1972) 22

Logan Lanes v. *Brunswick Corporation*, 378 F.2d 212, 217 (9th Cir. 1967), cert. den., 389 U.S. 898 (1967) 6, 13, 14, A19, A25

National Labor Relations Board v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 130 (1971) 11

Perkins v. *Standard Oil Company of California*, 395 U.S. 642, 647 (1969) 11

Rogue River Valley Irrigation District v. *Employment Division*, — Or. App. —, — P.2d —, decided April 14, 1975 ..... 16, A39

INDEX OF AUTHORITIES (Cont.)

Cases — Page

Students Book Company v. *Washington Law Book Co.*, 232 F.2d 49, 50-51, fn. 5 (D.C. Cir. 1955), cert. den., 350 U.S. 988 (1956) 6, 13, A7, A25, A29

United States v. *Champlin Rfg. Co.*, 341 U.S. 290, 297 (1951) 17

United States v. *Rothberg*, 480 F.2d 434, 535 (2d Cir. 1973), cert. den., 414 U.S. 856 17

United States v. *Wise*, 370 U.S. 405, 411 (1962) 17

University Hill Foundation v. *C.I.R.*, 446 F.2d 701 (9th Cir. 1971), cert. den., 405 U.S. 965 22

Statutes

Internal Revenue Code, 26 U.S.C. §§ 501, 503, 512, and 513 ..... 5, A16

Nonprofit Institutions Act, 15 U.S.C. § 13c 3, 4, 7, 11, 12, 14, 16-17, A53

Robinson-Patman Act, § 1, 15 U.S.C. § 13 ..... 3, 7, 11, 12, 13, 16, A

Tax Reform Act of 1969, 83 Stat. 487 ..... 4, 5, 22

28 U.S.C. § 1292(b) 1

ORS ch. 545 ..... A39

ORS ch. 657 ..... A39, A40

ORS 657.045 ..... A40-42

Rules and Regulations

U. S. Sup. Ct. Rule 23 ..... 6, A28, A29

Internal Revenue Code § 1.513-1(a), Tax Regulations, 1975 ..... 5, A16

Rev. Rulings 68-374, 68-375, and 68-376, Internal Revenue Bulletin, Cumulative Bulletin, 1968-2, July 1968 5

INDEX OF AUTHORITIES (Cont.)

Miscellaneous — Page

Amended Complaint (App. VI) 7, A31

American Society of Hospital Pharmacists Resolution (App. XII) 24, A60

April 3 and 18, 1975 Letters to Petitioners (App. V) 6, A25

Differences Between Logan Lanes and Case at Bar (App. IV) 13, A20

Non-Profit Institutions Act, House Report No. 2161, Senate Report No. 2162, 75th Congress, 3d Session, 1938 (App. II) 4, A11

Franke, et al, *Mirror to Hospital Pharmacy* A47

Howard Steinbach Affidavit re Non-Profit Hospital Drug Dispensing Practices (App. VIII) A43

Oregon Association of Hospitals Newsletter (App. XI) 18, A57

Plaintiff's R. Franklin Hart Affidavit re Hospital Drug Dispensing Practices (App. IX) A49

Roreem and Fischelis, *The Costs of Medicines*, 1932 ..... A46

Small Business Problems in the Drug Industry, House Select Committee on Small Business House Report No. 1983, 90th Congress, 2d Session, Dec. 31, 1968, pp. 77-83 (App. I) 4, A1, A22

Stanley E. Hartman Affidavit re First Year that Portland Area "Non-Profit" Hospitals Applied for Pharmacy Licenses (App. X) A52

INDEX OF AUTHORITIES (Cont.)

Page

The Drug Makers and Drug Distributors, Background Papers, Task Force on Prescription Drugs, U. S. Department of Health, Education, and Welfare, 1968 ..... A47

U. S. Code Congressional and Administrative News, 91st Congress, First Session, 1969 5

SUMMARY OF BRIEF

No substantial Federal question.

No conflict between circuits.

Decision is interlocutory, based on disputed, incomplete record and is therefore not ripe for appellate review.

Decision is in accord with:

(1) The only two prior appellate court decisions construing § 13c;

(2) Congressional intent in enacting Nonprofit Institutions Act of 1938;

(3) Report of 1968 House Small Business Committee, *Small business Problems in the Drug Industry;*

(4) Tax Reform Act of 1969;

(5) Internal Revenue Code § 1513-1;

(6) IRC Rev. Rul. 68-374 and 68-375;

(7) Rules of statutory construction.

Logan Lanes, relied on by petitioners, is:

(1) distinguishable on the facts;

(2) was decided by the same Court that decided the case at bar;

(3) recognizes the distinction between purchase for "own use" and purchase for resale, and

(4) is in accord with the case at bar.

Changes since 1938 in hospital drug dispensing practices do not repeal by implication the § 13c purpose to limit preferential prices to drugs dispensed to hospitalized and emergency patients.

The decision does not interfere with or have any adverse effect on hospital patients or any hospital drug function inside or outside the § 13c exemption.

Assuming *arguendo* some interference with a "non-profit" hospital's commercial drug sales in competition with community pharmacies, the § 13c exemption was never intended to allow tax-exempt organizations to engage in unfair competition with retail pharmacies.

Assuming *arguendo* the possibility of some adverse effect on non-parties, relief should be sought from the legislative, not the judicial branch of government.

In the Supreme Court

of the United States

OCTOBER TERM, 1974

No. 74-1274

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC.,

Respondent,

v.

ABBOTT LABORATORIES, et al,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (App. A of Petition) is reported at 510 F.2d 486. It was an interlocutory appeal under 28 U.S.C. § 1292(b). The opinion of the District Court is reported at App. B of Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Where

(a) petitioners sold drugs to 14 alleged "non-profit" hospitals in the Portland, Oregon area at prices, terms and conditions which grossly discriminated against respondent's assignors and other community pharmacies in competition with the hospitals;

(b) the hospitals resold these drugs to members of the general public having no connection with the hospitals as patients or otherwise, and also to members of their staff, the staff's families, volunteers, and to patients to use after they left the hospital;

(c) those mentioned in (b) used the drugs for their own use outside the hospitals;

(d) the hospitals resold some of the drugs to medical clinics which, in turn, resold the drugs to those mentioned in (b) at locations remote from the hospitals;

(e) the hospitals resold some of the drugs in bulk to physicians who removed the drugs to their offices where they were resold to or used by private non-hospitalized patients;

(f) the hospitals passed on their lower drug acquisition costs to employees and physicians;

(g) the hospitals did not pass on their lower drug acquisition costs to patients but, instead, reaped substantial profits of as high as 60 per cent of sales;

(h) the drug prices the hospitals charged to "walk-in" and other members of the general public and others were in many instances considerably lower than the petitioners' prices to respondent's assignors and other community pharmacies, making it impossible for the assignors and other community pharmacies to compete with the result that half of those in the Portland area have perished;

(i) the prices charged by hospitals to their hospitalized patients were frequently much higher than the prices charged to third parties for use off the premises;

are all such sales exempt from the Robinson-Patman Act, 15 U.S.C. §§ 13 et seq., by virtue of 15 U.S.C. § 13c, which provides that the Act shall not apply:

> ". . . to purchases of their supplies for their own use by . . . hospitals, and charitable institutions not operated for profit."?

RESPONDENT'S OBJECTION TO GRANTING PETITION

The petition should be denied for the following reasons:

No substantial Federal question.

No conflict between the circuits.

The decision is interlocutory, based on a disputed record and is therefore not ripe for appellate review.

The decision reflects proper application of rules of statutory construction.

The decision is in accord with Congressional intent in 1938 to limit the 15 U.S.C. § 13c, 52 Stat. 446, exemption to a non-profit hospital's ". . . purchases of their supplies for their own use." The Nonprofit Institutions Act. (App. II at A11).

Changes in the degree of hospital commercialization that have arisen since enactment of the exemption do not repeal by implication the original purpose of § 13c to limit preferential drug prices to non-commercial dispensing of drugs within the hospital to hospitalized and emergency patients.

A "non-profit" hospital's commercial drug sales at issue here in competition with retail pharmacies are outside the § 13c exemption. The decision is in accord with the findings in 1968 of a congressional committee:

> "Small Business problems in the Drug Industry," House Select Committee on Small Business, House Report No. 1983, 90th Congress, 2d Session, Dec. 31, 1968, pp. 77-83. App. I at A1. Also see R. 125-156 and R. 483-492.

The decision is in accord with the Tax Reform Act

of 1969. 83 Stat. 487, amendments to the Internal Revenue Code making hospitals and other exempt organizations subject to taxation on their unrelated commercial business income. U. S. Code Congressional and Administrative News, 91st Congress, First Session, 1969, pp. 568-573, 1689-1690, 1901-1902, 2032-2033, and 2096-2100; 26 U.S.C. §§ 501, 511, 512, and 513.

The decision is in accord with Internal Revenue Code § 1.513-1(a), Definition of unrelated trade or business, Tax Regulations, 1975, which provides in part:

> ". . . Thus, for example, the regular sale of pharmaceutical supplies to the general public by a hospital pharmacy does not lose identity as trade or business merely because the pharmacy also furnishes supplies to the hospital and patients of the hospital in accordance with its exempt purposes or in compliance with the terms of section 513(a)(2). . . ." (App. III at A18).

The decision is in accord with two Internal Revenue rulings as to when hospital drug sales constitute unrelated commercial business income. Rev. Rul. 68-374 and 68-375, Internal Revenue Bulletin, Cumulative Bulletin, 1968-2, July 1968, 242-246; R. 721-724. But see R. 724-725.

The decision is in accord with the only two prior appellate court decisions. Both decisions recognize the distinction between a § 13c "purchases of their supplies for their own use" purchase and a purchase for resale:

Students Book Company v. *Washington Law Book Co.*, 232 F.2d 49, 50-51, fn. 5 (D.C. Cir. 1955), cert. den., 350 U.S. 988 (1956).

Logan Lanes v. *Brunswick Corporation*, 378 F.2d 212, 217 (9th Cir. 1967), cert. den., 389 U.S. 898 (1967).

The decision is distinguishable on the facts from the case relied on by petitioners. See App. IV at A19.

The decision, contrary to petitioner's unsupported allegation, does not interfere with any function of a non-profit hospital, modern or otherwise.

Deliberate and repeated failure to comply with the accuracy requirement of subsection 4 of U. S. Sup. Ct. Rule 23:

> "4. The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

The facts have been grossly distorted, glossed over and misstated by petitioners.

The failures are set forth in respondent's April 13 and 18, 1975 letters to petitioners, App. V at A25.

Assuming *arguendo* some interference with a "non-profit" hospital's commercial drug sales in competition with community pharmacies, the § 13c eleemosynary institutions' exemption was never intended

to allow tax-exempt organizations to engage in unfair competition with retail pharmacies.

STATEMENT OF THE CASE

Petitioners have not asked this Court to review that portion of the decision reversing the District Court decision granting summary judgment as to drug sales made to Bess Kaiser Hospital (Pet. App. at A 4-5). Sales by Bess Kaiser Hospital to members of the general public having absolutely no connection with the hospital, either as patients or members—are massive.

The amended complaint (App. VI at A31) states that petitioners violated Section 1 of the Robinson-Patman Act, 15 U.S.C. § 13, 49 Stat. 1526, by:

1. Selling identical drugs to alleged "non-profit" hospitals at lower prices than those charged respondent's assignors (neighborhood pharmacies);
2. Selling identical drugs to alleged "non-profit" hospitals at terms and conditions not offered to said assignors;
3. Hospital resale of said drugs to physicians for their office use and others outside the scope of the 15 U.S.C. § 13c, 52 Stat. 446 ". . . purchases of their supplies for their own use . . ." exemption to the Robinson-Patman Act in competition with respondent's assignors.

Petitioners accept substantially (Tr. May 25, 1973, pp. 16-17) all of the statistical data respondent assembled in chart form.

The admitted exhibit reflects the following evidence in the record:

1. Drug sales totaling $32,792,997;
2. Net profits from drug sales of $10,155,165;
3. Net profits on drug sales as high as 60 per cent;
4. Average net profit on drug sales of 38.68 per cent for the 13 hospitals for which profit data was available;
5. Drug sales to employees, physicians, volunteers and their families at prices substantially below the prices charged patients for use outside the hospital;
6. Drug sales to physicians for their private office use;
7. Drug sales to medical clinics at locations remote from the hospital;
8. Drug sales to patients for consumption after discharge;
9. Drug sales to "walk-in" members of the general public, all for use off the premises by individuals not patients of the hospital;
10. Economic death of half the Portland area neighborhood pharmacies.

Various of the alleged "non-profit" hospitals enjoyed huge overall net profits (R. 555-598).

HOSPITAL AGREEMENTS

Three petitioners already require alleged "non-profit" hospitals not to resell drugs obtained at preferential prices to members of the nonhospitalized public, thus recognizing impliedly (at least) the correctness of the decision.

The A. H. Robins new account application (R. 530) provides:

> "It is represented that drugs purchased from A. H. Robins Company by the above named institution will be dispensed only to patients, employees or students of such institution."

The Eli Lilly and Company agreement provides:

> "THIS ACCOUNT REPRESENTS THAT IT IS A NON-PROFIT ORGANIZATION (TAX-EXEMPT HOSPITAL OR TAX-SUPPORTED INSTITUTION) & THAT PURCHASES MADE UNDER THIS AGREEMENT ARE *FOR ITS OWN USE WITHIN THE INSTITUTION AND ARE NOT FOR RESALE.*" (Fawkes Dep. Ex. 8) (Emphasis added).

The Carter-Wallace, Inc. agreement provides:

> "2. HOSPITAL agrees that goods received under this Direct Sales AGREEMENT will be for use in the operation of

> HOSPITAL and its direct clinics and branches and that no merchandise so purchased will be re-sold to retail stores, chain stores, wholesalers, or other hospitals." (Fawkes Dep. Ex. 9).

The University of Oregon Medical School abandoned plans to sell drugs to private patients of staff physicians after investigation of legal and administrative requirements. (R. 657).

Sandoz, a major drug company and a non-defendant, uses a hospital price agreement that requires the hospital on preferentially priced drugs to dispense such drugs "*exclusively within the confines of the purchasing institution. . . .*" (R. 656).

THE RECORD BELOW

The trial court record is incomplete and disputed.

Despite repeated requests the District Court refused to allow respondent to make discovery of petitioners concerning their exclusive knowledge of facts relevant to their summary judgment motion.

Discovery was "limited," as the Court of Appeals stressed (A3).

Petitioners did not submit any affidavits or exhibits to contradict respondent's numerous exhibits.

Respondent's uncontradicted exhibits raise numerous issues of fact relevant to the summary judgment motion, *e.g.*, the Montee affidavit (R. 343) proving "walk-in" drug purchases from various hospitals

whose officials said they did not sell to the public. The affidavit was admitted (R. 866).

ARGUMENT

The antitrust laws, and the Robinson-Patman Act in particular, are construed broadly, while exemptions are construed strictly and in favor of competition. *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973) and *Perkins* v. *Standard Oil Company of California*, 395 U.S. 642, 647 (1969).

The Robinson-Patman Act was enacted in 1936 to prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

In the absence of an unmistakable directive, the Court has refused to construe legislation aimed to protect a certain class in a fashion that will run counter to the goals Congress clearly intended to effectuate. *National Labor Relations Board* v. *Plasterers' Local Union No. 79*, 404 U.S. 116, 130 (1971).

Here the "non-profit" hospitals are large buyers while respondent's assignors and other community pharmacies are relatively small buyers. They compete with each other for retail drug sales when hospitals resell the drugs for a nonhospital use.

The special break given by the § 13c exemption

by its terms applies only where the exempt institution, in this instance, "non-profit" hospitals, were not engaged in commercial competition with other buyers.

THE COMPETITION ISSUE

The Robinson-Patman Act and its narrow § 13c exemption should be construed together to accomplish the major purpose of the Act — preservation of competition.

Competition cannot be preserved when "non-profit" hospitals receive unfair preferential prices and conditions denied community pharmacies on the pretext the drugs are for the hospitals' own use, but then resell the drugs in unfair price competition with community pharmacies.

The decision does not interfere with any hospital drug function inside or outside of the § 13c exemption.

It merely holds that a drug company may not give a "non-profit" hospital a lower § 13c price than retail pharmacies on drugs resold to physicians for their private office practice and to others who are not hospitalized or emergency room patients.

PRIOR DECISIONS

Petitioners err at page 9 of their petition in claiming only one "prior Section 13c decision." Their fn. 6 at page 11 is misleading.

Judge Bazelon wrote the opinion and dissented

only on issues irrelevant here in *Students Book Company* v. *Washington Law Book Co., supra.*

In fn. 5 Judge Bazelon made a ruling of law as to the application of § 13c at 232 F.2d 50-51:

> ". . . the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and *the books sold were not for the use of the universities, but for resale at a profit. The exemption provision is therefore inapplicable to these transactions.*" (Emphasis added).

Petitioners' reliance on *Logan Lanes* v. *Brunswick Corporation, supra,* is misplaced.

In that case the Court made clear the distinction between purchase of capital equipment for university use and resale of fungible supplies at a profit.

The Court said of *Students Book Company* v. *Washington Law Book Company, supra:*

> ". . . The court held that sales to self-sustaining campus bookstores for resale at a profit are not sales to universities within the meaning of section 13 of the Act. . . ."

Also see App. IV at A19, which lists 29 differences between the case at bar and *Logan Lanes.*

It is significant that the same Court issued *Logan Lanes* and the challenged decision.

In *Logan Lanes* bowling lanes (and related equipment) were purchased for and used by Utah State

University for the use of its physical education classes and recreational use of its students, faculty and staff. Only after they had been installed and used for some time did Utah State permit a few members of the general public to use the lanes on occasions, too. In distinguishing *Logan Lanes*, Judge Merrill said (A8):

> "Our case does not involve the acquisition of plant equipment. It involves acquisition of stores of supplies. Plant equipment acquired for a university's own use cannot be segregated from that acquired for use by others, since the same equipment serves both uses. In the case of stores of supplies acquired for consumption the situation is otherwise. Supplies that are resold can readily be segregated from those devoted to a hospital's own use."

PETITIONERS' CASES IRRELEVANT

Petitioners err in claiming in fn. 4 at page 9 that § 13c "includes new hospital uses as well as those which were then common." Their footnote citations do not support their contention. None of the cases cited deal with 13c.

Petitioners did not advise the Court that one of the decisions relied on is not final because both sides have appealed the ruling: *Eastern Kentucky Welfare Rights Organization* v. *Simon*, 506 F.2d 1278 (D.C. Cir. 1974) (2-1 decision; rehearing en banc denied by split vote); Dkt. 74-1110, filed March 6, 1975, and Dkt. 74-1124, filed March 8, 1975.

The Court of Appeals held at 506 F.2d 1289 that "to qualify as a tax exempt charitable organization, a hospital must still provide services to indigents."

In other words, despite changes in hospital function, a tax exempt hospital must continue to provide charity.

Fortnightly Corporation v. *United Artists Television, Inc.*, 392 U.S. 390 (1968) supports respondent's position that a statute is construed as of the date of enactment and under the circumstances existing at that time.

The Court held at 392 U.S. 401-402:

> "We have been invited by the Solicitor General in an *amicus curiae* brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy. We decline the invitation. That job is for Congress. *We take the Copyright Act of 1909 as we find it.* With due regard to changing technology, we hold that petitioner did not under that law 'p e r f o r m' the respondent's copyrighted works." (fns. omitted) (Emphasis added).

To the same effect is another case cited by petitioners: *Browder* v. *United States*, 312 U.S. 335 (1941). The Court held at 312 U.S. 339-340:

> ". . . Old laws apply to changed conditions. The reach of the act is not sustained or opposed by the fact that it is sought to bring new situations under its terms. While a stat-

ute speaks from its enactment, even a criminal statute embraces everything which subsequently falls within its scope. . . ." (fns. omitted).

The fact that since 1938 "non-profit" hospitals have become (1) less charitable, (2) more commercial and profit-making, and (3) now compete commercially with retail pharmacies does not warrant judicial amendment of 15 U.S.C. §§ 13 and 13c.

Gulf Oil Corporation v. *Copp Paving Company*, — U.S. —, 95 Sup. Ct. 392, 402 (1974) rejected statutory expansion by judicial decision.

Rogue River Valley Irrigation District v. *Employment Division*, — Or. App. —, — P.2d —, decided April 14, 1975, App. VII at A39 applies the familiar rule that exemptions are construed narrowly and that profit-making activities can jeopardize an exemption.

In the case at bar there is substantial evidence of substantial profits from "non-profit" hospital drug sales.

If hospital drug sale practices have expanded since 1938, § 13c has not, and must be interpreted as of the year it was enacted — 1938.

Petitioners and *amicus curiae* American Hospital Association concede that in 1938 "non-profit" hospitals did not sell drugs to nonpatients.

Appendices VIII, IX and X at A43 et seq. are post-summary judgment trial court file affidavits. They establish without contradiction that hospital drug

sales to nonpatients are a post-1938 development outside the scope of § 13c legislative intent.

Statutes are construed with reference to the circumstances existing at time of passage. *United States* v. *Wise*, 370 U.S. 405, 411 (1962); *Civil Aeronautics Board* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 323 (1961), and *United States* v. *Champlin Rfg. Co.*, 341 U.S. 290, 297 (1951).

As held in *United States* v. *Rothberg*, 480 F.2d 534, 535 (2d Cir. 1973), cert. den., 414 U.S. 856: "In construing a statute to determine the intent of Congress, we must do so in light of the conditions under which the Congress did act. . . ."

Statutory language is read in light of its purpose and legislative history. *Gulf Oil Corp.* v. *Copp Paving Company, supra*, 95 S. Ct. 399.

There is nothing in the trial court file or the petition to support petitioners' alleged "reason" at page 6 for granting the writ that the decision "adversely affects the purchase of hospital drug supplies throughout the United States. . . ."

The claimed adverse effect is not explained.

It is not the fact.

A hypothetical, unsupported claim of an unspecified adverse effect on non-parties is not a ground for granting the writ.

Appendix XI at A57 is a January 15, 1975 Oregon Association of Hospitals newsletter by its Associate Director and Legal Counsel. The newsletter ad-

vised its members to comply with the decision. OAH members appear to be doing so without difficulty or upset.

PETITIONERS' POLITICAL ARGUMENTS SHOULD BE REJECTED

Petitioners—without record or factual support — have made a vast number of unfounded and unsupportable arguments, which request this court to repeal the clear and unmistakable language of 13c, which limits the exemption to "purchases of their supplies for their own use . . . ." While better addressed to Congress, nevertheless we do not wish the record to reflect inaccuracy either. For example:

(a) *Costs:*

It is not true that hospitals—and certainly not the public—will be faced with increased costs if this law is enforced according to its clear tenor, as the Court of Appeals has done.

For example, petitioner manufacturers may continue to sell to hospitals at favorable prices with respect to drugs used in the hospital and in the emergency room. The only restriction is that if they sell drugs to hospitals, which are not intended for hospital use but instead for resale, the price charged to the hospital and a competing neighborhood pharmacy be the same.[1]

[1] And, of course, this exemption is not a matter of being supine, either, as the *amicus* brief facetiously characterizes our stance. Of course, it would not matter whether the inpatient or emergency patient was horizontal or vertical at the time he or she receives the drug.

If hospitals wish to act as sub rosa drug stores by reselling the drugs to nonhospitalized persons (which, of course, they are privileged to do), then why should they not pay the same price as neighborhood drug stores with whom they would then compete on that part of their purchases? Or why should a neighborhood drug store be penalized by a higher price because it truthfully calls itself a 'drug store' rather than a 'hospital pharmacy' in those instances where they conduct their business in precisely the same way?

If this court were to place its imprimatur on disparate prices merely because one purchaser is called a hospital pharmacy and another a drug store, what is to preclude the *xxx* hospital from opening a branch pharmacy at a location remote from the hospital? Would Doctors Hospital, for example, be permitted to open a so-called hospital pharmacy next to Dart Drug at 11th & G, and use its leverage of discriminatory prices to obliterate the latter?

In fact, this is already being done in Portland by the Kaiser Hospital and satellite pharmacies, with devastating effect on the drug stores in the vicinity.

(b) *Bookkeeping:*

It is not true that hospitals will be faced with a crushing bookkeeping task in separating drugs which they use in the hospitals from those which they sell for use outside the hospitals to third persons or members of their staffs, etc. The fact is that the hospitals keep such records now. Prescriptions are invariably written—and indeed are required to be written—where

the drugs are not given to hospitalized patients. It has never been felt necessary to our knowledge to keep the two sets of drugs in different receptacles. No change would be necessary.

(c) *Convenience to the public:*

Throughout petitioners seem to imperiously assume that the general public is somehow better served if hospitals are given a better break than are drug stores, even where the hospitals act exactly like drug store by selling indiscriminately to members of the general public. We cannot buy such contemptuous assertion. The only real question, we submit, is whether the public is to be given a choice or not. If the hospitals are to be favored in such uneven and unfair struggle, by buying the drugs for pennies while druggists are required to pay dollars for the same, then it is only a matter of time before the latter succumb. If such occurs, the only result would be that the public would no longer have an option. No longer would it be able to go to the corner drug store for needed medications. It may have no choice but to travel whatever distance necessary to reach the nearest hospital pharmacy, and to pay whatever price may be exacted. The resultant added travel can only aggravate the energy crisis which confronts us all.

(d) *Operation of a Modern Hospital:*

Petitioners have fantasized that the Court of Appeals ruling will somehow preclude hospitals from operating as modern hospitals or providing outpatient

care. Nothing could be farther from the fact. No change whatever is requested in the operation of hospitals, as petitioners must surely know. We ask only one thing—that if petitioners dispense under-the-table discounts to hospitals, for products which are not intended for hospital use, that the same break be given to neighborhood pharmacies for those products where they compete.

We concede that hospitals' expenses have risen. But so have those of neighborhood pharmacies. Why should one be advantaged more than the other in those respects where they compete?

(e) *Outpatients:*

Stressed in petitioners' brief is that outpatient clinics will be precluded or hampered. There is no factual or record support for this.

In reality, there is no reason that outpatient clinics would be disrupted, or changed in the slightest.

Anyone visiting an outpatient clinic for emergency treatment would be covered by the court's ruling, which allows price breaks for those supplies dispensed during "treatment to patients at emergency clinics."

Moreover, petitioners may continue to charge the same price they have been charging to hospitals even for those drugs never intended to be used on the hospital premises, providing only they do not discriminate against neighborhood pharmacies.

(f) *End Use of the Proceeds:*

Petitioners also argue that hospitals should be permitted to buy their products at discriminatory prices because they frequently use the money thus derived from such unfair leverage to noble ends, such as expansion of plant facilities, etc.

This is only an ill disguised "ends justify the means" argument clad in different raiment. Similar arguments for other violations of the law have always been summarily rejected.

The general rule, reinforced by the Tax Reform Act of 1969, makes the source of the profits, not the "use" or "destination" of the profits controlling for tax exemption purposes. If the source is outside the tax exemption, as is the case here, what is done with the profits from unrelated commercial business income is irrelevant. *Louis W. and Maud Hill Family Foundation* v. *United States*, 347 F. Supp. 1225, 1227 (Minn. 1972); *University Hill Foundation* v. *C.I.R.*, 446 F.2d 701 (9th Cir. 1971), cert. den., 405 U.S. 965.

The effect of the repeated and persistent discriminatory pricing by petitioners has been catastrophic. More than half of the neighborhood[2] pharmacies in

[2] The number of community pharmacies in the Portland area which have gone out of business is (R. 541-542):

1972 — 7	1965 — 7	1959 — 0
1971 — 7	1964 — 2	1958 — 0
1970 — 11	1963 — 8	1957 — 2
1969 — 6	1962 — 1	1956 — 0
1967 — 8	1961 — 4	1955 — 1
1966 — 8	1960 — 1	1954 — 2

the Portland area have perished within the past ten years.

The extent of diversionary sales is massive. One hospital alone in the Portland area to whom defendants made discriminatory sales, filed 216,958 prescriptions for nonhospitalized individuals between December 26, 1967 and May 8, 1973 (R. 832). Another—231,061 between July 1, 1970 and April 12, 1973. A third filed 49,435 new prescriptions between August 23, 1968 and May 11, 1973. A fourth, 48,759 new prescriptions between March 29, 1969 and March 16, 1973. A fifth, 38,045 between March 15, 1971 and March 9, 1973. A sixth, 17,803 between February 2, 1971 and February 2, 1973.

Each prescription necessarily means a sale to a nonhospitalized patient; for those who are still patients receive merely an intrahospital order, not a prescription number. (R. 755-6).[3]

It is also more than coincidental that the highest rate of attrition of Portland pharmacies is in the immediate area of the hospitals who have received discriminatory price breaks from defendants.

[3] Petitioners err when they assert that the record does not show that there were hospital sales to physicians for use in their private practices, refills of "take-home" prescriptions, and occasional sales to "walk-in" customers (members of the public having no connection with the hospitals) in "legally significant amounts." (Pet. Br. 8, ftn. 3).

Nothing could be further from the truth.

The record is replete with references to such sales, even though the district court has allowed only the barest discovery imaginable, and only the tip of the iceberg has yet emerged. However, even that tip is of massive proportions.

To make matters infinitely worse, the District Judge even refused to enter an order which would have prevented the destruction of records by defendants during the pendency

Assuming *arguendo* the possibility of some adverse effect on non-parties, relief should be sought from the legislative, not the judicial branch of government. *Anchor Serum Company* v. *Federal Trade Commission*, 217 F.2d 867, 873 (7th Cir. 1954).

American Society of Hospital Pharmacists Supports Decision

Petitioners' false alarms are refuted by the action of the American Society of Hospital Pharmacists.

The Society supports the principle of the decision.

The national professional organization is best qualified to declare whether the decision may be harmful to hospitals.

App. XII quotes part of the inaugural address April 23, 1975 in San Francisco of Fred M. Eckel, Society President.

Mr. Eckel said the Society's board of directors "discussed the Portland case and the underlying principles of preferential pricing at length" and reached the following consensus of opinion:

> "The American Society of Hospital Pharmacists:
>
> (1) opposes in principle the preferential pricing of drugs except when based

of this action, while simultaneously preventing us from having discovery of such records. Defense counsel were, evidently, taken aback by this ruling, and ultimately stipulated to a limited form of non-destruction of records order.

> on volume discounts that are available to all purchasers;
>
> (2) believes that noninstitutional purchasers should enjoy the same prices now available to many institutional purchasers. . . ."

The Society resolution states respondent's objective:

(1) The end of price discrimination where "nonprofit" hospitals compete commercially with community pharmacies for retail drug sales;

(2) Even-handed treatment for all competitors.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROGER TILBURY
HENRY KANE

April 29, 1975

APPENDIX I

90th Congress, 2d Session - - - - - - Union Calendar No. 839
House Report No. 1983

SMALL BUSINESS PROBLEMS IN THE DRUG INDUSTRY

A REPORT

OF

SUBCOMMITTEE NO. 5

TO THE

SELECT COMMITTEE ON SMALL BUSINESS

HOUSE OF REPRESENTATIVES

NINETIETH CONGRESS

SECOND SESSION

PURSUANT TO

H. Res. 53

A RESOLUTION CREATING A SELECT COMMITTEE TO CONDUCT STUDIES AND INVESTIGATIONS OF THE PROBLEMS OF SMALL BUSINESS

DECEMBER 31, 1968.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

U.S. GOVERNMENT PRINTING OFFICE

98-006 WASHINGTON : 1968

CHAPTER IV. CONCLUSIONS

After studying the body of testimony and other evidence received by it during the course of its hearings, the committee has reached the following conclusions:

1. There is little or no price competition in the marketing of trademarked pharmaceutical products among manufacturers. According to the testimony of manufacturers themselves, demand is highly price inelastic, but depends rather upon therapeutic efficacy and sometimes even more upon vigorous and continuing promotion, particularly in the work of so-called detailmen in convincing physicians they should prescribe a particular drug by its trademark name.

Since neither the pharmacist nor the patient is free to substitute another product for that prescribed, it can readily be seen that price competition cannot be a controlled factor in determining demand.

2. The difference between drug prices charged retailers and wholesalers as compared to those charged institutional and governmental customers is extremely substantial, often being over 50 percent. According to testimony in the record of the hearings, this differential is not always fully explainable by either cost justifiable quantity discounts, economies of scale, or other factors inherent in bulk distribution. Donald Van Roden, vice president and general manager of pharmaceutical operations, of Smith, Kline & French, verified this during his appearance before the committee.

To the extent that a greater differential is granted to institutional customers than is justified by the economics of the transaction, it is clear that retail pharmacists and their customers are subsidizing that transaction.

3. Numerous acts and policies of individual manufacturers seem and in some instances appear violative of the Robinson-Patman Act or other antitrust statutes.

4. A number of manufacturers appear to be genuinely interested in and concerned with the preservation and fostering of small business drug wholesalers and retailers as full-fledged members of the Nation's health team.

5. From its continuing study of the subject matter the committee believes that some change for the better may have commenced on the part of some drug manufacturers since the hearings were concluded. It is the hope of the committee that voluntary action will continue and increase to the extent necessary to correct the situations harmful to small business described in the testimony received during the hearings.

6. More vigorous action is required at the earliest possible time on the part of the Federal Trade Commission to enforce the Robinson-Patman Act and other statutes administered by it if small business drug wholesalers and retail pharmacists are to continue their important role in serving the Nation's health needs.

* * *

8. There is considerable testimony of record relating to discriminatory prescription drug sales between classes of competitors at the nongovernmental health-care institutional level and the retail pharmacy level of prescription drug competition. Nongovernmental health-care institutions, notably profit and nonprofit hospitals, clinics, nursing homes, physicians in private practice, and the like, are in competition with neighboring retail druggists to the extent that both classes sell prescription drugs to the general consumer, to people off the street, to private nonhospitalized patients of physicians, and to people with the physical mobility to shop for prescription drugs in the community.

It is reasonable to infer from the testimony on this subject that there has been a widespread practice by many nationally prominent drug manufacturers granting large drug price concessions to such institutional buyers without regard to the realities of prescription drug competition at the retail level. Such events were dramatically illustrated by the testimony of Mr. James Scully, a New Jersey retail pharmacist. The institution here in issue is a private nonprofit hospital in Woodbury, N. J. Seven or eight community drugstores are located in this trading area, most of them within 2 miles of the hospital. This hospital maintained a pharmacy facility convenient to and among other things for the purpose of selling prescription drugs to people off the street, and to others who were not hospitalized patients. This nonprofit hospital received across-the-board price concessions directly

from national drug manufacturers of one-third to two-thirds less than the price competing pharmacies paid the same drug manufacturers on a direct-buying basis for the same drugs. The resulting adverse competitive effects of such concessions at the retail druggist level of competition are believed to be quite clear. In other words, were it not for the exempt status of nonprofit institutions, such pricing would not be permitted. This is not an isolated situation, but widespread according to the testimony of a large number of both retailers and wholesaler witnesses.

The drug price concessions to these institutional buyers has been of such great magnitude that some have entered the marketplace as de facto wholesalers, selling to retail druggists in competition with drug wholesalers.

The Nonprofit Institutions Act of 1938 is designed to afford immunity to private nonprofit institutions (like hospitals so organized), from the prohibitions of the Robinson Patman Act to the extent the sales are for the nonprofit institution's "own use." The Nonprofit Institutions Act does not apply to institutions organized for profit.

When a profit or a nonprofit hospital purchases drugs for its "own use," this purpose is for a different function, i.e., unit doses for hospitalized patients rather than for resale at the retail drug distribution level. In such "own use" purchases, at least in the contemporary climate of drug distribution in the United States, the hospital is not thereafter compet-

ing with retail druggists, because of such functional difference. Conversely, when the drug sales are not for such hospital's "own use," but rather for general consumer resales, the institution is competing with the retail druggist because it is functioning in a competitive sense just like a retail druggist.

This same result occurs when a "for-profit" health care institution buys drugs for its "own use" on one hand, or retail drug sales on the other hand. The Robinson-Patman Act is concerned with the realities of competition, not labels (*Federal Trade Commisison* v. *Simplicity Pattern Co.*, 360 U.S. 55 (1959)).

There is no basis apparent from the record why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring nongovernmental institutional purchasers, profit or nonprofit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists. Consumer interests are compromised by permitting drug price discrimination in the area, because the retailers and consumers ultimately must pay higher drug prices as a form of economic subsidy to the drug supplier for the lower prices which that drug supplier charges the institutions.

To be sure, there may be a gray area in determining where own-use purchasers leave off and retail competition begins with the private institutional health-care purchaser. This gray area centers on so-called outpatient dispensing by health-care institutions. While the term "outpatient" is not susceptible

of one simple definition which embraces all hospitals, the following factors appear to apply:

(1) An "outpatient" is a person who, although receiving hospital services, is not a confined, hospitalized patient;

(2) The outpatient, by virtue of not being hospitalized, presumably has the physical mobility to purchase prescription drugs from retail sources other than the hospital;

(3) Hospital drug sales to physically mobile outpatients therefore should be recognized as straightforward retail sales in direct competition with any other retail druggists in the community. The outpatient may be a captive customer or patient of the institution for other health-care services, but because of mobility, the outpatient is capable of securing his prescription needs in the community.

These issues of drug distribution have not been the subject of public enforcement proceedings by the Feedral Trade Commission, and the only private antitrust suit, known to the committee, which has been commenced in this area was never adjudicated on the merits.[1]

However, the sheer magnitude of the price dis-

[1] *Contra Costa Ph. Assn.* v. *Ciba Pharm. Products, Inc.*, Civ. No. 46218 (N.D. Calif. filed Dec. 28, 1966), *Students Book Co.* v. *Washington Law Book Co.*, F.2d 49, 50, Note 5. (D.C. Circuit Ct. 1955. Cert. denied 350 U.S. 988 (1956). Sale of books to college was within "own use" exemption but sale for profit by student bookstore was outside exemption.

criminations evident from the record of these hearings would seem to justify vigorous remedial action by the Federal Trade Commission. It is unreasonable to expect the remedy of private antitrust enforcement by disfavored retail druggists to serve as a sufficient deterrent to drug manufacturers' discriminatory pricing.

It should be made absolutely clear at this point that the findings of the subcommittee, which have just been stated, in no way lead to the conclusion that the solution to the problems raised is to increase the costs to institutional customers to the level of the present costs of retailers. The public interest requires, rather, that the often excessive gap between prices to wholesalers and retailers on the one hand, and institutional customers on the other, should be closed by lowering the price to retailers. Only in this way can those members of the public requiring drugs for the preservation of their health and, indeed, for their very life buy at prices which do not discriminate against them.

As pointed out herein above, there is an almost total absence of the usual type of price competition in the marketing of trademarked pharmaceuticals. For this reason, there is an almost unique duty on the part of drug manufacturers to substitute their judgment and self-discipline for the price regulating function traditionally played within our free enterprise society by competition in the marketplace. The continuing absence of such restraint can lead only to further governmental intervention of a type that would be less than welcomed by the drug manufacturers.

* * *

CHAPTER V. RECOMMENDATIONS

1. It is recommended that the Federal Trade Commission hold appropriate proceedings to determine the area of competition between hospital pharmacies and small privately owned community pharmacies and take such further action as may be necessary to define the application of the Robinson-Patman Act thereto. Emphasis should be placed on determining the parameters of the proper application of the "own use" exemption of the Non-Profit Institution Act of 1938.

2. It is recommended that the Federal Trade Commission proceed, on a case-by-case basis, to investigate the apparent violations of the Robinson-Patman Act shown by the testimony and evidence received during the course of the hearings on which this report is based. It is further recommended that the Commission and its staff determine whether similar violations are occurring elsewhere in the drug industry.

With respect to all cases where violations of the Robinson-Patman Act or other antitrust statutes are found, it is recommended that the FTC or the Antitrust Division of the Department of Justice take prompt, appropriate, and vigorous action against those found to be commiting such violations.

3. It is recommended that the Federal Trade Commisison, on or before January 15, 1970, report to the chairman of this committee the actions it has taken with respect to the two preceding recommendations.

4. It is recommended that this committee, during the 91st and each succeeding Congress, study both the structural and behavioral aspects of the distributive sector of the drug industry and their effect on small business, particularly toward the goal of obtaining lower prices for retailers and their customers.

• • •

APPENDIX II

NON-PROFIT INSTITUTIONS ACT REPORT

HOUSE OF REPRESENTATIVES

75TH CONGRESS
3rd Session

REPORT
No. 2161

EXEMPTION OF ELEEMOSYNARY INSTITUTIONS FROM THE ROBINSON-PATMAN ACT

April 19, 1938—Referred to the House Calendar and ordered to be printed

---

MR. WALTER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 8148]

The Committee on the Judiciary, to whom was referred the bill H.R. 8148, to amend Public Law No. 692, Seventy-fourth Congress, second session, after consideration, report the same favorably to the House with an amendment with the recommendation that as so amended the bill do pass.

The committee amendment is as follows: "Strike out all of line 9."

The reported bill provides that the Robinson-Patman Act shall not apply to purchases of their supplies for their own use by schools, colleges, universities,

public libraries, churches, hospitals, and charitable institutions not operated for profit.

The Robinson-Patman Act prohibits price discriminations between purchasers in interstate commerce, excepting differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the different methods or quantities in which such commodities are sold and delivered, where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition.

The committee does not feel that the wholesome purpose of the Robinson-Patman Act will be interfered with by the enactment of this bill to make certain that favors in price which are occasionally extended to eleemosynary institutions, because of the character of the institution, do not fall under the ban of the act.

In this connection there follows a self-explanatory communication from the president of the Hospital Bureau of Standards and Supplies, a nonprofit-making association of 200 voluntary hospitals located from Maine to Texas:

HOSPITAL BUREAU OF STANDARDS AND SUPPLIES,
New York, N. Y., December 18, 1937.

Hon. H. W. SUMNERS,
United States House of Representatives
Washington, D. C.

MY DEAR CONGRESSMAN: The 2,700 voluntary nonprofit hospitals of the country spend over 150 million dollars a year on foodstuffs and supplies for the care of the needy sick, who would otherwise be a burden on Federal, State, and municipal institutions.

Because of the charitable nature of their work many suppliers have hitherto allowed these institutions special prices on their purchases. This the Robinson-Patman Act now prohibits and as a consequence, hospital supply bills are increasing about 20 percent.

Most, if not all, of these institutions have for years operated at a deficit. If these deficits are to be increased by 30 million dollars a year, many hospitals may have to close their doors. The needy sick must be cared for and such a development would throw an almost impossible additional burden on the Federal, State, and municipal institutions.

We, therefore, respectfully request that you keep these facts in mind when the proposed amendment to the Robinson-Patman Act, exempting the eleemosynary institutions of the country, comes up for consideration of the Congress.

Sincerely yours,

JOHN H. HAYES, *President.*

75TH CONGRESS
3d Session

REPORT
No. 1769

SENATE

EXEMPTION OF ELEEMOSYNARY INSTITUTIONS FROM THE ROBINSON-PATMAN ACT

APRIL 20 (calendar day, MAY 10), 1938.
Ordered to be printed

MR. LOGAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 8148]

The Committee on the Judiciary, to whom was referred the bill (H.R. 8148) to amend Public Law No. 692, Seventy-fourth Congress, second session, after consideration of the same, report favorably thereon to the Senate with the recommendation that it do pass.

The bill provides that the Robinson-Patman Act shall not apply to purchases of supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

The purpose of the Robinson-Patman Act, to prohibit price discrimination between purchasers in interstate commerce where competition would thereby be lessened, does not seem to apply as to eleemosynary institutions as they are not operated for profit. The

act does forbid such favors as might now be granted by sellers to such institutions.

There follows a self-explanatory communication from the president of the Hospital Bureau of Standards and Supplies, a nonprofit association of hospitals, which letter was considered by the House.

• • •

APPENDIX III

§ 1.513 [Comprises Code section 513, see 26 U.S.C.A. (I.R.C. 1954) § 513]

§ 1.513-1 Definition of unrelated trade or business

(a) In general. As used in section 512 the term "unrelated business taxable income" means the gross income derived by an organization from any unrelated trade or business regularly carried on by it, less the deductions and subject to the exceptions, additions and limitations provided in section 512. Section 513 specifies with certain exceptions that the phrase "unrelated trade or business" means, in the case of an organization subject to the tax imposed by section 511, any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational or other purpose or function constituting the basis for its exemption under section 501 (or, in the case of an organization described in section 511(a) (2) (B), to the exercise or performance of any purpose or function described in section 501(c) (3)).

* * *

Therefore, unless one of the specific exceptions of section 512 or 513 is applicable, gross income of an exempt organization subject to the tax imposed by section 511 is includible in the computation of unrelated business taxable income if (1) it is income from trade

or business, (2) such trade or business is regularly carried on by the organization, and (3) the conduct of such trade or business is not substantially related (other than through the production of funds) to the organization's performance of its exempt functions.

(b) Trade or business. The primary objective of adoption of the unrelated business income tax was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the nonexempt business endeavors with which they compete. In general, any activity of a section 511 organization which is carried on for the production of income and which otherwise possesses the characteristics required to constitute "trade or business" within the meaning of section 162—and which, in addition, is not substantially related to the performance of exempt functions —presents sufficient likelihood of unfair competition to be within the policy of the tax. Accordingly, for the purposes of section 513 the term "trade or business" has the same meaning it has in section 162, and generally includes any activity carried on for the production of income from the sale of goods or performance of services. Thus, the term "trade or business" in section 513 is not limited to integrated aggregates of assets, activities and good will which comprise businesses for the purposes of certain other provisions of the Internal Revenue Code. Activities of producing or distributing goods or performing services from which a particular amount of gross income is derived do not lose identity as trade or business merely because they

are carried on within a larger aggregate of similar activities or within a larger complex of other endeavors which may, or may not, be related to the exempt purposes of the organization. *Thus, for example, the regular sale of pharmaceutical supplies to the general public by a hospital pharmacy does not lose identity as trade or business merely because the pharmacy also furnishes supplies to the hospital and patients of the hospital in accordance with its exempt purposes or in compliance with the terms of section 513(a).* * * * (Emphasis added).

APPENDIX IV

Differences Between Logan Lanes and Case at Bar

	Logan Lanes	*Case at Bar*
1.	One plaintiff at one location.	Some 60 community pharmacy assignors in three metropolitan counties.
2.	One favored purchaser at one location.	14 favored "nonprofit" hospital purchasers in three counties.
3.	Purchaser a public body automatically exempt by 15 U.S.C. § 13c as one of a class of "universities."	14 private organizations. Affiliate of Bess Kaiser Hospital subject to taxation as a membership organization.
4.	Purchaser tax-exempt as a state institution.	Pharmacies of two of the 14 favored purchasers, Kaiser and Gresham hospitals, on the Multnomah County property tax rolls because of their drug sales to the public. R. 653-655). Two of the 14 "nonprofit" hospitals — Kaiser and Willamette Methodist — pay federal income taxes on their drug sales.
5.	One-time capital equipment item purchased for some $80,000; must be	Continuous purchases of small unit, fungible drug product supplies for (1) internal hospital use and

	purchased as a unit.	(2) for resale.
6.	University bowling equipment not resold.	Drug products resold at "substantial profits." (Pet. App. A3).
7.	Capital equipment purchased for proper use.	Drug products at issue resold *inter alia*, to physicians at subsidized prices for resale in their private office practice, and to "walk-in" members of the general public.
8.	Evidence of public use of bowling equipment *de minimis*.	Admitted evidence of substantial drug sales to, *inter alia*, the general public without restriction, *i.e.*, Rosco Pirtle dep. pp. 8-14, and Pirtle dep. ex. 2.
9.	Plaintiff allowed to make discovery.	District Court refused to allow respondent to make discovery of evidence in petitioners' exclusive possession, *i.e.*, Tr. 9/11/72, p. 115, lines 16-19; R. 425-427.
10.	No evidence of profit to university.	Drug profits substantial. Pet. App. A-3.
11.	No evidence of damage to plaintiff.	Stipulated evidence of 50 per cent decline in number of Portland community pharmacies, R. 541-542. Also see R. 125, lines 11-12.

12.	No evidence that supplier-defendant considered outside use improper.	Three petitioners, by written contract, attempt to limit use to hospital use only; diversion considered improper: A. H. Robins (R. 530); Eli Lilly (R. 491 and Fawkes dep. ex. 8), and Carter-Wallace, Inc. (Fawkes dep. ex. 9). Also see R. 656.
13.	No evidence of diversion of bowling equipment.	Admitted evidence of diversion from hospitals of drugs purchased at § 13c prices to, *inter alia*, physicians for resale in their private office practice, *i.e.*, Scott dep. ex. 27A reflects Kaiser Hospital resale of $543,961.15 in drugs to physicians' group. Also see Scott dep. 10/20/72, p. 27, lines 6-10; and deposition excerpts at R. 544 to 549.
14.	Court did not block any effort to discover improper diversion.	District Court refused to allow respondent to make discovery of admitted Kaiser Hospital drug diversion from hospital. R. 282-287; R. 386, lines 7-11.
15.	No evidence that plaintiff lost customers to university	Substantial evidence that assignors lost customers to 14 "non-profit" hospi-

	because school purchased bowling equipment at lower price than plaintiff.	tals because of discriminatory prices enjoyed by hospitals, *i.e.*, R. 113, lines 8-26.
16.	No evidence of compulsory bowling equipment use sales by university.	Two victims testified to compulsory purchase of drugs from hospital contrary to their expressed wishes: Alan T. Carlston dep. and Betty Marie Pye dep.
17.	No use of bowling equipment off university grounds.	Substantial admitted evidence of drugs purchased from hospital consumed away from hospital premises, *i.e.*, Greenlick dep. ex. 2 at 2-14 and Pirtle ex. 2.
18.	No evidence of overcharging.	Admitted evidence of illegal overcharges to Public Welfare Division of State of Oregon. Fawkes 12/21-/72 dep. p. 33, line 14.
19.	No evidence of effect on competition.	Evidence of substantial effect on competition.
20.	No congressional investigation.	House Small Business Committee investigated and criticized, *inter alia*, preferential drug prices to hospitals which resold drugs in competition with retail pharmacies. App. II at A 1.

21.	Ruling for plaintiff would have raised cost to university on future equipment purchases for university use.	Ninth Circuit ruling does not increase cost to hospitals for "own use" drug purchases. At most they would pay market price for drugs sold for resale outside the § 13c exemption.
22.	District Court not in doubt as to decision.	District Court expressed some doubts. Pet. App. A 14-15.
23.	No private profit to an individual.	Permanente Clinic physicians share in Kaiser Hospital net profits. R. 496; Scott dep. 12/14/72, pp. 36-37 and Scott dep. ex. 17B. Pet. App. A 4-5. Physicians who purchased drugs from hospitals profited indirectly from lower prices granted the hospitals.
24.	No goods resold.	Drugs resold, *inter alia*, to physicians for their office use and resale to office patients.
25.	No restrictive Internal Revenue Service rulings.	IRS revenue rulings classify some hospital drug sales as taxable unrelated income. R. 721 through R. 725.
26.	No restrictive court decisions.	Recent court decisions require "nonprofit" hospi-

		tals to provide some charitable care, *i.e., Eastern Kentucky Welfare Rights Organization* v. *Simon*, 506 F.2d 1278, 1289, D. C. Cir. 1974) (J. Skelly Wright, dissenting in part); petitions for certiorari pending: Dkt. 74-1110, filed 3/6/75, and Dkt. 74-1124, filed 3/8/75.
27.	No stipulated evidence.	See, *inter alia*, Montee affidavit re hospital drug purchases. R. 343-346.
28.	Defendant Brunswick offered affidavits in support of motion.	No petitioner offered affidavit in support of the summary judgment motion.
29.	Limited trial court file.	Extensive trial court file: R 1-986, 47 depositions and numerous exhibits plus transcript of nine separate court proceedings between Sept. 11, 1972 and May 25, 1973.

APPENDIX V

April 13 and 18, 1975 Letters to Petitioners

April 13, 1975

• • •

It is respectfully submitted that there are a number of errors in the petition that should be corrected in the interest of factual accuracy.

1. The table of citations list the first five cases as being on page 11, when they appear to be on page 10;

2. The table of citations lists *Logan Lanes* as being on page 10 instead of page 9, does not list the page 11 reference, and states incorrectly that it appears on page 13;

3. The table of citations lists *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.* at page 11 instead of page 10;

4. *Students Book Company* v. *Washington Law Book Co.* is listed at page 12 instead of at page 11;

5. The table of citations does not refer to references to *Logan Lanes* and *Students Book Company* in Appendix A;

6. The reference to *Eastern Kentucky Welfare Rights Organization* v. *Simon*, 406 F.2d 1278 (D.C. Cir. Oct. 9, 1974) is incomplete because it does not make reference to the fact that petitions for certiorari were filed (dkt. 74-1110, filed 3/6/74 and dkt. 74-1124 filed 3/8/75);

7. The Statement of the Case at page 4 of the petition claims that plaintiff-respondent filed a complaint "charging petitioners with violations of the Robinson-Patman Act" when, in fact the complaint also charges violation of the Sherman Act (see page 1, lines 29-32 of the amended complaint and page 2, lines 1-3 of the amended complaint); the statement is misleading as well as incorrect;

8. The Statement of the Case at p. 4 of the petition is misleading. It refers to five counts, lists four, and neglects to mention that on the Fifth Cause of Action, the antitrust claim, the court has refused to allow any discovery;

9. The Statement of the Case at pp. 4-5 of the petition is misleading in that it fails to advise the Supreme Court that various defendants denied all allegations relevant to the issue at bar, paragraphs 20 et seq. of the amended complaint;

10. The Statement of the Case at p. 5 of the petition is incomplete and misleading because it fails to advise the Supreme Court that the trial court (1) refused to allow any discovery of any defendant on the Second Cause of Action and (2) refused to allow plaintiff-respondent to inquire of the hospitals concerning prices, terms and conditions of sale;

11. Despite the footnote, the Statement of the Case at p. 5 of the petition is misleading because the petition claims that "It affirmed the district court's decision that the hospitals were nonprofit institutions, [2] . . ."

12. The Statement of the Case at p. 5 of the petition is misleading in that the petition claims that ". . . it agreed with the district court that the record established the ways in which hospitals dispense drugs." I do not find any such agreement and further note that the trial court refused to allow discovery as to diversion of drugs from the Kaiser hospital facility; the Ninth Circuit said at A5: ". . . it appears that drugs were distributed by the hospitals under the following circumstances: . . . .";

13. Page 6 of the petition claims under reasons for allowing the writ that "The decision of the court of appeals adversely affects the purchase of hospital drugs. . . ." when, in fact, there is nothing in the trial court file or the petition to support the allegation;

14. Pages 7 and 8 of the petition are misleading in attempting to dispose of three important drug distribution categories by footnote, categories 4 and 8 and the no. 7 category of drug sales to physicians for dispensation in the course of their private practice;

15. Fn. 3 at p. 8 of the petition errs in claiming:

> "[3] The decision of the court of appeals lists three additional classes of hospital drug dispensing which the record shows do not occur in legally significant amounts: . . ."

The Kaiser sales to nonpatients alone are significant, defendants conceded during oral argument that they were relying on the *de minimis* defense, a defense rejected by the court of appeals, and plaintiff-respondent vigorously disputed by undisputed affidavits the

self-serving estimates of hospital witnesses;

16. Page 9 of the petition claims that the Ninth Circuit's ruling "Prevents Nonprofit Hospitals from Operating as Modern Hospitals Must in Order to Fulfill Their Responsibilities to the Public," when, in fact, there is nothing in the trial court file or the petition to support the quoted claim;

17. Page 11 of the petition errs in claiming that the Ninth Circuit ruling "is an Abrupt and Unfortunate Retreat From the Only Previous Construction of Section 13c, Which Has Been Until Now the Prevailing View of the Statute . . ." because of the prior ruling of *Students Book Co.* v. *Washington Law Book Co.* relied on and cited by the Ninth Circuit at A9;

18. Page 11 of the petition contains an erroneous statement in fn. 6:

> "[6] The Act was referred to in a footnote in an opinion *announcing, but dissenting from the decision* in *Students Book Company* v. *Washington Law Book Company*. . . ." (emph. added)

Judge Bazelon wrote the opinion and dissented only from matters irrelevant to the issue at bar.

In footnote 5 Judge Bazelon made a ruling of law at 232 F.2d 50-51:

> ". . . the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and *the books sold were not for the use of the universities, but for resale at a profit. The exemption provision is therefore inapplicable to these transactions.*" (emphasis added).

[19.] Appendix D to the petition does not appear to be part of the trial court file; if I am incorrect, please so advise.

Because the plaintiff-respondent desires to file its response as soon as possible we request that defendants-petitioners advise whether they intend to make any corrections, and if so, which items.

We would be happy to stipulate that a substitute petition could be filed for the original one.

May we hear from you at your earliest convenience.

* * *

April 18, 1975

* * *

This confirms our discussion this date concerning proposed corrections to the petition for certiorari suggested in my April 13, 1975 letter to defendants' counsel.

You advised that some, but not all, of defendants' counsel met April 18, 1975 and decided that the petition shall stand as filed.

The petition appears to be in violation of U. S. Sup. Ct. Rule 23 4.:

> "4. The failure of a petitioner to present with *accuracy*, brevity, and clearness whatever is essential to a ready and adequate un-

derstanding of the points requiring consideration will be a sufficient reason for denying his petition." (emphasis added).

The petition appears to be in violation of U. S. Sup. Ct. Rule 23.1. (a):

"1. The petition for writ of certiorari shall contain in the order here indicated —

"(a) A reference to the official and *unofficial reports* of the opinion delivered in the courts below, if any, and if reported. . . . (emphasis added).

Portland Retail Druggists Association, Inc. v. *Abbott Laboratories, Inc.*, the decision appealed from, was unofficially reported in 1974-2 TRADE CASES, ¶ 75,-437 (9th Cir., filed Dec. 26, 1974).

And as noted earlier, Mr. McMurry's address appears to be incorrect.

* * *

April 18, 1975

* * *

APPENDIX VI

Amended Complaint

(R 52-77)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

U. S. District Court
District of Oregon
FILED
Nov. 22, 1971
ROBERT M. CHRIST, Clerk

PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., an Oregon non-profit corporation, on behalf of its assignors, Plaintiff, v. ABBOTT LABORATORIES, et al, Defendants.	CIVIL No. 71-543 AMENDED COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER THE ANTITRUST LAWS; JURY TRIAL REQUESTED

FIRST CAUSE OF ACTION

* * *

1. Jurisdiction and venue are founded upon the Clayton Act (38 Stat. 730, Oct. 15, 1914, Ch. 323, Title 15 USC § 13 et seq.) as amended by the Robinson-Patman Act (June 19, 1936, Ch 592, 49 Stat 1526) and other amendments, and upon the Sherman

Act (July 2, 1890, Ch 647, 26 Stat. 209), 15 U.S.C. § 1 et seq., and subsequent amendments, and on 15 U.S.C. §§ 1, 2, 8, 9, 13, 15, 22 and 26, and related sections.

* * *

20. Plaintiff's assignors are in direct competition with the favored customers of defendants for the patronage of ultimate consumers of defendants' drugs except enrolled patients hospitalized in the purchasing institution.

UNLAWFUL DISCRIMINATION

21. More than four years ago and continuing to and including the date of the filing of this amended complaint, defendants and each of them unlawfully discriminated against plaintiff's assignors in the course of interstate commerce, in the sale of drugs of like grade and quality, by granting discounts, allowances, compensation, payments, services, brokerage, terms, facilities, rebates and lower prices than said commodities were sold to plaintiff's assignors, and such favorable discounts, allowances, compensation, payments, services, brokerage, terms, facilities, rebates and lower prices were not made available to plaintiff's assignors on equal terms.

22. Defendants' drugs were sold in interstate commerce for use, consumption, resale or distribution within the United States and multiple sales took place in interstate commerce.

23. The unjust and unlawful differentials set

forth in paragraph 21 of this amended complaint are not attributable to differences in the cost of manufacture, sales or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

24. The exemption given sales to schools, colleges, universities, public libraries, churches, hospitals and charitable institutions not operated for profit by 52 Stat. 446, c. 283, 15 U.S.C. § 13c, where the drugs are employed for their own use, is limited to drugs used exclusively within the confines of the purchasing institution for enrolled patients of the institutions while such patients are so confined and for no other purpose.

25. Sale or distribution of any drug purchased at a discriminatory discount, allowance, compensation, payment, service, brokerage, term, facility, rebate or lower price by a non-profit institution to any person other than an enrolled patient in the purchasing institution is a violation of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13.

26. The exemption granted by 15 U.S.C. § 13c does not include cities, counties, states and the federal government other than in their capacities as operators of hospitals and charitable institutions not operated for profit when they administer drugs to enrolled patients.

27. Said acts of discrimination by defendants against plaintiff's assignors enable the favored competitors to offer drugs at no cost or nominal cost to their consumers and for sale at prices substantially

below the retail prices that must be charged by plaintiff's assignors if they are to remain in business. Thus, plaintiff's assignors have been and are rendered less able to compete, and competition in said line of commerce has been, and is, substantially lessened and impaired.

28. The unlawful discrimination of the defendants set forth herein compels plaintiff's assignors to pay a higher and discriminatory unit cost for drugs of the same type.

29. The unlawful discrimination of the defendants set forth herein subsidizes defendants' favored purchasers with unearned and unjustified lower prices at the expense of plaintiff's assignors.

30. The unlawful discrimination of the defendants set forth herein compels plaintiff's assignors to contribute all or a disproportionate share of defendants' profits on drugs.

31. Said acts of discrimination by defendants against plaintiff's assignors constitute subsidized or below-cost sales to the favored purchasers at the expense of the retail customers of plaintiff's assignors, with resultant injury of said assignors and to the general public.

32. Said acts of discrimination by defendants against plaintiff's assignors preclude said assignors from competing successfully and threaten to, and if continued, will, terminate said assignors as competitors in drugs and cause them irreparable damage and reduce the number of competitors and thereby tend

to create a monopoly, and to injure, destroy or prevent competition.

33. Said acts of discrimination by defendants against plaintiff's assignors have, to date, resulted in the failure of numerous community pharmacies in the State of Oregon, and unless said acts of discrimination are permanently enjoined, will result in the failure of an additional and substantial number of community pharmacies in the State of Oregon, including at least some of plaintiff's assignors.

34. Defendants, directly and indirectly, sell drugs to proprietary nursing homes, hospitals and other institutions at more favorable discounts, allowances, compensation, payments, services, brokerage, terms, facilities, rebates and lower prices than are made available to plaintiffs' assignors.

35. Said proprietary nursing homes, hospitals and other investor-owned institutions resell said drugs to staff personnel and to members of the public.

36. The defendants and each of them were and are aware that hospitals and other purchasers favored by defendants resell drugs to persons not confined to the hospital or other favored institution.

SECOND CAUSE OF ACTION

37. Plaintiff incorporates paragraphs 1 through 36 by reference.

38. Defendants, directly and indirectly, sell drugs to hospitals and other institutions not operated for

profit on more favorable discounts, allowances, compensation, payments, services, brokerage, terms, facilities, rebates or lower prices than are available to plaintiff's assignors. Such hospitals and other institutions not operated for profit subsequently resell such drugs to staff personnel and to members of the public who are not patients enrolled in said hospitals and other non-profit institutions.

* * *

FIFTH CAUSE OF ACTION

44. Plaintiff incorporates paragraphs 1 through 43 by reference.

45. Beginning more than four years ago at a date unknown to plaintiff's assignors and continuing to the date of the filing of this complaint, defendants and each of them, acting individually and/or collectively, have attempted to monopolize and to restrain trade or commerce in the sale of drugs, by engaging in activities designed to foster such objectives by means of a combination, contract and conspiracy with the other defendants and with other unknown co-conspirators, and by engaging in a combination, concert of action, agreement, and also through individual action.

46. Defendants have attempted to monopolize and to restrain trade or commerce in the sale of drugs, by engaging in activities designed to foster such objectives by means of a combination, contract and conspiracy with the plaintiff's assignors, and by engaging in a combination, concert of action, agreement,

and also through individual action. To further the objectives of said illegal actions, defendants have:

(a) Systematically discriminated with respect to discounts, allowances, compensation, payments, services, brokerage, terms, facilities, rebates or lower prices to other accounts who were in competition with plaintiff's assignors;

(b) Systematically attempted to cripple and inhibit the sales of drugs by plaintiff's assignors by the device of granting massive discriminatory favoritisms to the competitors of such plaintiff's assignors;

(c) Restricted the ability of the general public to purchase drugs from plaintiff's assignors because of the much higher prices which plaintiff's assignors were obliged to charge in order to recoup the overcharges which had been imposed upon them by defendants;

(d) Arbitrarily, unlawfully, unreasonably and knowingly prevented, suppressed and eliminated competition between retailers of drugs by such practices;

(e) Rechanneled and restructured the flow of interstate commerce by curtailing the freedom of the general public to shop for its drugs at the outlet of its choice, and forced those customers who did not have an entree with a favored outlet to pay an enhanced price;

(f) Prevented and inhibited the freedom of plaintiff's assignors from charging a competitive price for defendants' products, because of the practical neces-

sity of recouping the excessive and discriminatory prices charged by defendants and each of them;

(g) Effectively secured a preferred position for the favored segment of the pharmaceutical distribution industry, and thus directly and materially impeded and burdened interstate commerce.

* * *

APPENDIX VII

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Rogue River Valley Irrigation District,

Petitioner,

v.

Employment Division, Ross Morgan, Administrator,

Respondent.

Filed
April 14, 1975
COURT OF APPEALS

* * * * *

Judicial Review from Employment Division Referee.

Argued and submitted February 18, 1975.

* * *

Affirmed.

LANGTRY, P. J.

This appeal is the third of companion cases. . . . The petitioner irrigation district in this case was organized and exists, as do the others, under ORS ch. 545. The Employment Division had determined, as with the others, that petitioner is subject to the unemployment compensation Act as it was amended in 1973. ORS ch 657. As with the Klamath and Talent districts, a relatively small part of petitioner's deliv-

ered water is used for ornamental and gardening purposes on small tracts of land. It was testified that this nonfarm water constitutes approximately 3 percent of all water delivered. There is no dispute in this regard. The referee held that, on account of this small nonfarm use, the exemption of ORS 657.045(2)(c) does not apply to petitioner. If that were all there is to this case, it would be reversed on the basis of the decision in Klamath Irr. Dist. v. Employ. Div., supra.

However, petitioner has conceded that it has five or six active accounts for commercially used water for log ponds, concrete mixing, etc. Water is sold to these accounts without reference to water rights running with any particular land. In other words, regardless of the amount of profit the district may make therefrom, that portion of its operation is for profit. This was an additional reason for the referee's decision.

ORS ch 657 was extensively amended in 1971, according to legislative history, in order to incorporate therein 1970 amendments that had been made by Congress to the Federal Employment Tax Act. One of the changes thus accomplished was to add to the irrigation exemption the words "not owned or operated for profit." The part in question was re-enacted without change in 1973 and provides that "agricultural labor" includes labor

> ". . . in connection with the operation or maintenance of ditches, canals, reservoirs or waterways not owned or operated for profit used exclusively for supplying and storing water for farming purposes." ORS 657.045(2)(c).

The summary of changes submitted by the Employment division to the legislature at the time the 1971 amendment was under consideration simply related that the addition of these words was so "farm irrigation projects operated for profit will be covered." House Judiciary Committee Minutes. Nothing more appears to have been said about this particular change.

For the reason that petitioner concedes the sale of the commercial water is a profit operation, the referee correctly held the petitioner is subject to the Act.

Affirmed.

LEE, J., specially concurring.

I concur in the result of the majority opinion and with the stated reason for holding for the respondent (i.e. the failure of the petitioner to qualify, as non-profit-making, for the ORS 657.045(1) and (2)(c) exemption).

However, I believe the majority is mistaken in indicating that but for the profit-making nature of the district's contracts with 'five or six active accounts for commercially used water," the case should be reversed.

The record discloses that petitioner also supplies water to the Medford Corporation log pond and 338 other accounts (constituting approximately three percent of the total water supplied) for tracts of one

acre or less in size in the city of Medford where the water is used for "lawns" and "gardens" of a "household" variety.

I would affirm for the same reasons set forth in my dissent in Klamath Irr. Dist. v. Employ. Div., — Adv. Sh. —, — Or. App. —, — P.2d — (April 14, 1975).

APPENDIX VIII

HOWARD STEINBACH AFFIDAVIT RE NON-PROFIT HOSPITAL DRUG DISPENSING PRACTICES

U. S. DISTRICT COURT
DISTRICT OF OREGON
FILED
Jan. 2, 1974
ROBERT M. CHRIST, Clerk

* * *

I, HOWARD STEINBACH, being first duly sworn, depose and say:

1. I am a registered pharmacist licensed by the State of Oregon, a partner in the operation of three pharmacies in the metropolitan area of Portland, including the Bel Aire Pharmacy, 12020 S. W. Allen Avenue, Beaverton, Oregon 97005, an assignor in the above-entitled cause, have attended various of the drug practices depositions taken by plaintiff, am familiar with the trial court file in this cause, make this affidavit on my personal knowledge, and make this affidavit pursuant to Rule 56, F.R. Civ.P., in support of plaintiff's Second Cause of Action.

2. This affidavit is submitted in support of plaintiff's position that drug dispensing to outpatients and others by alleged "non-profit" hospitals was outside the "for their own use" exemption contemplated by the Congress when it enacted the 15 U.S.C. § 13c exemption to the Robinson-Patman Act.

3. I know of my own personal knowledge that defendants objected to plaintiff's efforts to make discovery for the period prior to the four years preceding the filing of the complaint.

4. I know of my own personal knowledge that defendants did not offer any evidence of dispensing practices of alleged "non-profit" hospitals in 1938, the year the Congress enacted the 15 U.S.C. § 13c exemption to the Robinson-Patman Act.

5. About 1959 I was employed for some six months as a hospital pharmacist by Good Samaritan Hospital, Portland, Oregon, an alleged "non-profit" hospital. In that capacity I was personally familiar with the drug dispensing practices and policies of said hospital.

6. During my employment, Good Samaritan Hospital:

(a) Refused to fill outpatient prescriptions;

(b) Refused to fill "take-home" prescriptions for use outside the hospital;

(c) Refused to fill prescriptions for emergency room patients not admitted to the hospital;

(d) Refused to fill prescriptions submitted by hospital volunteers;

(e) Discouraged and made difficult the filling of prescriptions submitted by physicians for their personal use;

(f) Discouraged and made difficult the filling of

prescriptions submitted by hospital staff employees;

(g) Made an exception to the above-listed practices and policies only for emergency or exceptional drugs not available in retail pharmacies;

(h) Did not, to my personal knowledge, sell drugs to physicians for their office use.

7. Exhibit A to this affidavit is the cover page and pages 93, 94 and 95 of Rorer and Fishelis, *The Costs of Medicines*, University of Chicago Press, 1932. The study dealt with the manufacture and distribution of drugs and medicines in the United States and the services of pharmacy in medical care, and was the most extensive study of its kind as of 1932.

8. Exhibit A, *The Costs of Medicines*, does not even mention hospital outpatient or general public dispensing in its discussion of hospital drug purchases and practices. Instead, the report indicates that as of 1932 virtually all hospitals were not equipped or staffed to dispense prescription drugs for use outside the hospital. The hospital does not need a pharmacist generally to dispense drugs to hospital patients, but needs a licensed pharmacist if it sells drugs for use outside the hospital to outpatients, staff and members of the public. Page 94 of *The Costs of Medicines* states:

> ". . . Probably not more than 1,500 of the 7,000 hospitals in the United States employ

the full-time services of one or more licensed pharmacists."

9. Exhibit B to this affidavit is the cover page and pages 6-8, 117-120 and 169 of Francke, Latiolais, Francke and Ho, *Mirror to Hospital Pharmacy*, American Society of Hospital Pharmacists, 1964. The comprehensive volume is a report of the audit of pharmaceutical services in hospitals. The study was financed by the U. S. Public Health Service.

10. Page 169 of *Mirror to Hospital Pharmacy* states in effect that as late as 1964 less than one-half of the some 7,000 hospitals had pharmacists who could issue prescriptions to nonpatients:

> "Almost 4700 of the approximately 7000 hospitals in the United States lack the services of a full-time pharmacist. . . ."

11. Your affiant believes that *Mirror to Hospital Pharmacy* does not contain statistical material prior to 1957 relating to outpatient or nonpatient dispensing because the practice had not become a significant factor until approximately that time. For similar reasons the study did not attempt to elicit information as to the number of hospitals which sell drugs to the general public, for as stated at pages 6 and 7:

> ". . . But the number of hospitals supplying this type of service is thought to be quite small. Most of the prescriptions furnished by hospitals to private pay patients are undoubtedly furnished to patients of a physician who is a member of the hospital staff."

12. Exhibit C to this affidavit is the cover page

and pages 72-73 of the Task Force on Prescription Drugs, *The Drug Makers and The Drug Distributors*, U. S. Department of Health, Education, and Welfare, 1968. Exhibit C at page 72 states:

> "A large number of hospitals apparently do not employ full-time hospital pharmacists, although there are wide discrepancies in the data. . . ."

13. Exhibit C at page 73 noted the growth of hospital outpatient prescriptions:

> "In 1965, hospitals dispensed 8.9 percent of all outpatient prescriptions, up from 7.0 percent in 1962. . . ."

14. After reviewing the traditional services of hospitals, Exhibit C at page 72 states:

> "Many hospitals now provide outpatient prescriptions services through the hospital pharmacy. . . .
>
> "When providing outpatient services, hospital pharmacies compete with other community pharmacies and other vendors for the community prescription drug dollar. . . ."

15. The above-quoted excerpts reflect the fact that outpatient and nonpatient drug dispensing was virtually unknown in 1932 and only came to attention in the 1950's and 1960's, which were of course considerably later than 1938, the year the Congress enacted the 15 U.S.C. § 13c "for their own use" exemption to the Robinson-Patman Act.

16. I certify that Exhibit A, Exhibit B and Exhibit C are true, full and correct copies of said docu-

ments, are in context and are considered authoritative in the pharmacy profession.

• • •

APPENDIX IX

PLANTIFF'S R. FRANKLIN HART AFFIDAVIT RE HOSPITAL DRUG DISPENSING PRACTICES

U. S. DISTRICT COURT
DISTRICT OF OREGON
FILED
Jan. 9, 1974
ROBERT M. CHRIST, Clerk

• • •

I, R. FRANKLIN HART, being first duly sworn, depose and say:

1. I am a registered pharmacist licensed by the State of Oregon, reside at 3815 S. W. 54th Place, Portland, Oregon 97221, am employed on a part-time basis as a hospital pharmacist by Portland Adventist Hospital, am competent to make this affidavit, make this affivadit on my personal knowledge, and make this affidavit pursuant to Rule 56, F.R.Civ.P., on behalf of plaintiff in connection with plaintiff's Second Cause of Action.

2. Between 1935 and 1939, I was an employee of Blumauer-Frank Wholesale Drug Company, Portland, Oregon, and its purchaser, McKesson & Robbins Drug Company. In that capacity I regularly called on hospitals and other drug purchasers in the Yakima area of eastern Washington.

3. For a period of some 27 years, ending with my retirement in 1966, I was an employee of E. R. Squibb & Sons, Inc. During most of my employment as a Squibb representative, I regularly visited hospitals

and other drug purchasers in the metropolitan area of Portland, Oregon.

4. In 1941 I regularly visited hospitals and other drug purchasers in the Everett and Bellingham area of western Washington.

5. Between 1955 and 1960 I was a hospital specialist for Squibb. In that capacity I regularly called on nonprofit and other hospitals in the Pacific Northwest states.

6. These regular visits, during which I conferred with hospital pharmacists and observed their operations, gave me personal knowledge of the hospital pharmacy practices of the hospitals I visited.

7. Prior to the end of World War II, the private and nonprofit hospitals in the Portland and other areas of the Pacific Northwest I regularly visited did not sell drugs to outpatients or "walk-in" members of the public, but limited their drug dispensing to emergency room and hospitalized inpatients. The hospitals during that period generally had but one pharmacist, and his time was more than fully occupied filling drug orders for hospitalized inpatients.

8. It was not until some time after the end of World War II that the hospitals I regularly visited began to have more than one hospital pharmacist and for some of the hospitals to fill prescriptions for outpatients and others.

9. The post-war practice of filling prescriptions for outpatients and others, as distinct from limiting

drug dispensing to hospitalized inpatients,, was not noticeable to me until after 1960.

• • •

APPENDIX X

STANLEY E. HARTMAN AFFIDAVIT RE FIRST YEAR THAT PORTLAND AREA "NON-PROFIT" HOSPITALS APPLIED FOR PHARMACY LICENSES

U. S. DISTRICT COURT
DISTRICT OF OREGON
FILED
Jan. 11, 1974
ROBERT M. CHRIST, Clerk

* * *

I, Stanley E. Hartman, being first duly sworn, depose and say:

1. I am a registered pharmacist licensed by the State of Oregon, am engaged in the practice of pharmacy as a community pharmacist, am a member of plaintiff, Portland Retail Druggists Association, Inc., am an officer of one of the assignors herein, am competent to make this affidavit, make this affidavit on my personal knowledge, and make this affidavit in support of plaintiff's Second Cause of Action.

2. Since the State of Oregon first commenced regulation of pharmacies in 1891, a pharmacy license has been required to issue a prescription drug in the State of Oregon.

3. Under Oregon law a hospital, non-profit or otherwise, is required to have a pharmacy license only when and if it distributes prescription drugs to persons who are other than hospitalized inpatients.

The reason is that hospitalized inpatients and emergency ward patients receive hospital drug orders, and such orders do not require a prescription. If a drug is to be consumed by a person who is not hospitalized or receiving emergency room treatment, the drug is issued in the form of the prescription required by law. In other words, not until a hospital begins to dispense prescriptions, as contrasted to hospital drug orders, must the hospital apply for a pharmacy license under state law.

4. A Second Cause of Action issue is the intent of the Congress when in the year 1938 it enacted the 15 U.S.C. § 13c "for their own use" exemption to the Robinson-Patman Act, 15 U.S.C. § 13, et seq.

5. Plaintiff has made part of the trial court file two affidavits that indicate that, in general, "non-profit" hospitals did not distribute drugs to nonpatients when the 15 U.S.C. § 13c exemption was enacted in 1938.

* * *

7. Evidence in the form of state documents that tend to support the above-identified Steinbach and Hart affidavits are Exhibit A to this affidavit. Exhibit A consists of the initial pharmacy license applications of 13 alleged "non-profit" hospitals in the Portland area that compete in the retail sale of drugs with plaintiff's assignors and other community pharmacies in Multnomah, Clackamas and Washington counties, Oregon. The Exhibit A documents reflect on their face the exact date the application was received

and the number of the license.

8. The hospital does not submit a new application for renewal of its pharmacy license. Instead, the hospital submits a routine renewal application that is identified as such.

9. The State Board of Pharmacy is an agency of the State of Oregon with offices in the State Office Building, Portland, Oregon 97201. The board maintains Exhibit A documents and other documents relating to inspection of hospital pharmacies in the regular course of business as public records open to inspection and copying.

10. The Exhibit A documents were copied from the originals thereof at plaintiff's request as public documents and were made available to plaintiff by A. G. "Mike" McLain, the board's Secretary-Treasurer and custodian of said documents.

11. I certify that the Exhibit A documents to this affidavit are true, full and complete copies of the originals in the files of the State Baord of Pharmacy.

12. Selected from a larger number of documents were the initial pharmacy applications of 13 of the 14 alleged "non-profit" hospitals in Multnomah, Clackamas and Washington counties, Oregon that now compete for retail drug business in competition with plaintiff's assignors and other community pharmacies in the said three counties. Not reproduced is the application of the 14th hospital, Dwyer Memorial Hospital, which was organized in the 1960's.

13. A number of the hospitals whose license applications are reproduced in Exhibit A hereto were in business prior to World War II. Good Samaritan Hospital, for example, was organized in 1871, more than one century ago. This factor is noted because even the hospitals in existence prior to World War II did not make their application until after the end of that war.

14. Summarized below from the Exhibit A documents by "non-profit" hospitals is the date of initial application for a pharmacy license:

(1)	Emanuel Hospital	January 12, 1946
(2)	Good Samaritan Hospital	December 22, 1945
(3)	Gresham General Hospital	July 29, 1959
(4)	Holladay Park Hospital	December 11, 1959
(5)	Kaiser Hospital	June 16, 1959
(6)	Portland Osteopathic Hospital	October 30, 1952
(7)	Physicians and Surgeons Hospital	May 3, 1948
(8)	Portland Sanitarium & Hospital (Portland Adventist Hospital)	June 13, 1967
(9)	Providence Hospital	December 29, 1945
(10)	St. Vincent's Hospital	January 2, 1946
(11)	Tuality Community Hospital	August 15, 1969
(12)	Willamette Falls Community Hospital	June 16, 1970
(13)	Willamette View Manor Hospital	August 1, 1958

15. It is apparent that the first license issued to any of the 13 alleged "non-profit" hospitals to dispense prescriptions is dated some seven years after the enactment in 1938 of the 15 U.S.C. § 13c exemption to the Robinson-Patman Act.

• • •

APPENDIX XI

**LEGAL
OAH / LABOR AND
LEGISLATIVE LETTER**

Oregon Association of Hospitals · 220 S. W. Morrison
Portland, Oregon 97204 · 228-5608

No. 23 January 15, 1975

IMPORTANT

Your hospital should, from date of your receipt of this letter, refrain from making sales of your hospital drugs to the categories listed herein on page 2 items 3 through 8 inclusive.

FAR-REACHING FEDERAL COURT OPINION RESTRICTING HOSPITALS' RESALE OF DRUGS

The U. S. Court of Appeals for the Ninth Circuit on December 26, 1974 reversed a judgment of the Federal District Court in Portland in the suit of 64 retail druggists in the Portland-Tri-County area brought against 12 national drug manufacturers charging violation of the Federal Robinson-Patman Act, which prohibits a seller to discriminate in the charges made to different purchasers of their products when in so doing the result would be to lessen competition or attempt to create a monopoly in any line of commerce or to injure, destroy or prevent competition. (It is likewise unlawful for a purchaser to knowingly receive the benefit of such discrimination.)

The plaintiff had alleged that in making "use" of the drugs purchased by non-profit hospitals such drugs were not used exclusively for the hospital and that the defendants sold their products to hospitals at a lower price than charged the plaintiff retail druggists.

Section 13(c) (sic) of the Act exempts charities and nonprofit hospitals from the jurisdiction of the Act. The opinion holds that the exemption applied only when the nonprofit hospital uses the subject drugs for its "own use" and that its "own use" is limited to use by *in-patients* and "in the course of treatment to patients at emergency clinics operated by the hospitals."

Defendant manufacturers indicated that as to 14 hospitals in the Portland area the drugs involved were put to the following uses:

1. They were dispensed to the hospitals' in-patients in the course of treatment.
2. They were dispensed in the course of treatment to patients at emergency clinics operated by the hospitals.
3. They were provided to departing in-patients as take-home prescriptions.
4. They were provided to persons who had been in-patients as renewals of prescriptions which had first been filled while those persons were in-patients.
5. They were sold for home treatment to out-patients either at hospital pharmacies or at out-patient clinics.

6. They were sold to the hospitals' employees and students or the private use of purchasers.
7. They were sold to hospitals' physicians for their personal or family use or for dispensation in the course of their private practice.
8. They were sold to walk-in customers who were not hospital patients.

• • •

James G. Swindells
Associate Director and Legal Counsel

APPENDIX XII

AMERICAN SOCIETY OF HOSPITAL PHARMACISTS RESOLUTION

American Society of Hospital Pharmacists

House of Delegates

Grand Ballroom, St. Francis Hotel
San Francisco, California
April 23, 1975

Inaugural Address of the President
Fred M. Eckel

". . . Redeeming the Time"

* * *

And while on the subject of drug prices, a word must be said about the "Portland case" involving differential pricing of drugs sold to hospitals.

Certainly, this case raises difficult questions for hospital pharmacists.

At its March meeting, your Board of Directors discussed the Portland case and the underlying principle of preferential pricing at length and reached a consensus opinion which we have expressed as follows:

"The American Society of Hospital Pharmacists:

(1) opposes in principle the preferential pricing of drugs except when based on volume discounts that are available to all purchasers;

(2) believes that noninstitutional purchasers should enjoy the same prices now available to many institutional purchasers;

(3) opposes any action which would increase the price of drugs to any part of the consuming public.

In developing a posture on this situation, we must keep foremost in our minds the overall public interest. . . ."